IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON,	:	Case No. 5:17-cv-00047-SL
Plaintiff,	:	Judge Sara Lioi
v.	:	
NFLPA, et al.,	:	
Defendants.	:	

Plaintiff David Lane Johnson's Memorandum in Support of his Refiled Motion to Vacate Arbitration Award under the Federal Arbitration Act, 9 U.S.C. §§ 1-16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

LIST OF EXHIBITS

Number	Description
1	October 11, 2016 Arbitral Award issued by James H. Carter
2	June 23, 2014 certification email from Dr. Finkle to Dr. Lombardo
3	Transcript of October 4, 2016 Hearing
4	Notice Arbitrator appointment letter, March 19, 2015
5	Transcript of September 22, 2016 Hearing
6	James H. Carter appointment letter, June 10, 2015
7	Grievant/Appellant Lane Johnson's First Set of Requests for Production of Documents
8	NFL's response to Johnson's First Set of Requests for Production of Documents
9	Ruling on Discovery Requests and Objections issued by James H. Carter
10	September 16, 2016 email from the NFL
11	September 16, 2016 email to NFLPA
12	NFL's September 30, 2016 response to James H. Carter's clarification and modification of his Ruling on Discovery Requests and Objections, including James H. Carter's clarification and modification
13	Excerpts from *International Commercial Arbitration in New York*, James H. Carter and John Fellas
14	James H. Carter's partial disclosure made in arbitration of Michael Pennel Jr., December 2, 2016
15	NFL Policy and Program on Substances of Abuse 2015
16	Unreported decisions cited herein in alphabetical order

STATEMENT OF THE ISSUES

ISSUE 1: Should this Court vacate the Award under Section 10(a)(1) of the Federal Arbitration Act, as Defendants procured the Award by corruption, fraud, and undue means?

ISSUE 2: Should this Court vacate the Award under Section 10(a)(2) of the Federal Arbitration Act, as the arbitrator demonstrated bias and evident partiality?

ISSUE 3: Should this Court vacate the Award under Section 10(a)(3) of the Federal Arbitration Act, as the arbitrator refused to hear evidence pertinent and material to the controversy and engaged in other misbehavior that prejudiced David Lane Johnson?

ISSUE 4: Should this Court vacate the Award under Section 10(a)(4) of the Federal Arbitration Act, as the arbitrator exceeded his powers throughout the arbitration?

SUMMARY OF THE ARGUMENT

The October 11, 2016 arbitration award ("Award")[1] underlying this proceeding is an exemplar for vacatur under the Federal Arbitration Act ("FAA"). From the outset of David Lane Johnson's discipline appeal, it was one against three -- Johnson vs. (1) the National Football League Players Association ("NFLPA"), (2) the National Football League and the National Football League Management Council ("NFLMC") (collectively the "NFL"), and (3) arbitrator James Carter. That Johnson's own union (the NFLPA) and Carter, who should have been neutral and impartial, acted adversely to Johnson highlights the need to vacate the Award.

The NFL and NFLPA, individually and in collusion, procured the Award through fraud and undue means. Throughout Johnson's appeal, Defendants disregarded the express terms of the NFL Policy on Performance-Enhancing Substances ("Policy"),[2] under which the NFL disciplined Johnson, to such a degree that Defendants corrupted the entire Policy.

Carter permitted and participated in Defendants' corruption. Indeed, Carter allowed the NFL to withhold from Johnson alleged modifications to substantive provisions of the Policy meant to protect him and other NFL players. The NFLPA also refused to provide Johnson these same modifications. Further demonstrating Carter's evident bias and partiality, he limited the discovery available to Johnson in violation of the Policy and ignored the Policy's burden-shifting paradigm freeing the NFL from meeting its required burden of proof. Additionally, despite knowing of nontrivial conflicts and his improper affiliation with Defendants, Carter never made any conflicts disclosure to Johnson. Defendants' misconduct paired with Carter's partiality and misbehavior makes the Award ripe for vacatur.[3]

---

[1] The Award is attached as Exhibit 1.
[2] The Policy is attached as Exhibit 1 to Johnson's First Amended Complaint. *See* Doc. No. 39-1.
[3] Johnson files this Motion before any opportunity to conduct discovery. That discovery will provide additional details about information withheld from Johnson, Carter's conflicts, and improper modifications to the Policy.

BACKGROUND

I. THE PARTIES

Johnson is a professional football player, whose exclusive bargaining representative is the NFLPA. Doc. No. 39 at 1726, 1732, ¶¶ 1, 2, 17. The National Football League is an unincorporated association of 32 professional football clubs, and the NFLMC represents these football clubs in collective bargaining with the NFLPA. Doc. No. 39 at 1726, ¶¶ 3-4.

II. THE POLICY

The NFLMC and NFLPA negotiated the Policy terms, which seek to deter player use of certain substances through testing and discipline. Doc. No. 39-1 at 1782, 1784. The Policy requires "transparency" in its "procedures," "scientific methodologies," and "appeals process" and promises a "fair system of adjudication" of discipline. Doc. No. 39 at 1733, ¶ 26.

The Independent Administrator, a purported neutral party, directs the Policy and is responsible for selecting players for drug tests, scheduling testing with the Collection Vendor,[4] and certifying violations for discipline or administrative action. Doc. No. 39 at 1744, ¶ 83. Dr. John Lombardo worked as the Independent Administrator. Doc. No. 39 at 1743, ¶ 82.

As an added layer of player protection, the Policy identifies Dr. Bryan Finkle as the Chief Forensic Toxicologist ("CFT"). Doc. No. 39-1 at 1810. The CFT is a "neutral party" and must review and certify laboratory results. Doc. No. 39-1 at 1786-1787.

The Policy allows testing under specific circumstances only (e.g., pre-employment, off-season, reasonable cause testing). Doc. No. 39 at 1734, ¶ 27. As to reasonable cause testing, the type of test under which the NFL most recently disciplined Johnson, the Policy states:

> Players who are placed into the reasonable cause program based on a violation of the Policy ***must remain in the program for a minimum of two years or two full seasons, whichever is shorter***, after which the Independent Administrator must

[4] The Collection Vendor collects, stores, and transports the player specimens. Doc. No. 39-1 at 1787.

> either discharge the Player or notify him in writing that he will remain in the program subject to review at a later date.

Doc. No. 39 at 1734, ¶ 28 (emphasis added).

The Policy requires the NFL and NFLPA to select "no fewer than three but no more than five arbitrators" to hear appeals. Doc. No. 39 at 1736, ¶ 40(c). Only neutral, "third-party arbitrators not affiliated with the NFL, NFLPA or [NFL] Clubs" may hear appeals. Doc. No. 39 at 1735, ¶ 40(a)-(b).

When a player appeals his discipline, the NFL has the initial burden of proving:

- a positive test result;
- that was obtained pursuant to a test authorized under the Policy; and
- that was conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory...

Doc. No. 39 at 1736, ¶ 40(f). According to the Policy, a positive test result exists only after the CFT verifies the laboratory's findings and certifies the test result. Doc. No. 39 at 1736, ¶ 40(g).

Upon appeal, the Policy requires the NFL to "provide the Player" with an indexed binder containing "relevant correspondence and documentation." Doc. 39-1 at 1800. A player also may seek "additional discovery" from the NFL. Doc. No. 39 at 1737, ¶ 40(j). The Policy precludes discovery of only: (1) information concerning other players and (2) the Policy's bargaining history. Doc. No. 39 at 1737, ¶ 40(j); Doc. No. 39-1 at 1801.

III. JOHNSON'S DISCIPLINE HISTORY

On April 23, 2014, Lombardo notified Johnson he tested positive for a prohibited substance. Doc. No. 39 at 1738, ¶ 42. In a May 19, 2014 letter, Lombardo notified Johnson he would be placed in the "reasonable cause" testing program. Doc. No. 39 at 1738, ¶ 42. On June 23, 2014, CFT Finkle emailed Lombardo certifying Johnson's 2014 test as positive. *See* Ex. 2 (June 23, 2014 email). On July 1, 2014, Lombardo told the NFL that Johnson was subject to

reasonable cause testing and sent Johnson's results to the NFL for administrative action. Doc. No. 39 at 1738, ¶ 43. On this date -- July 1, 2014 -- Lombardo placed Johnson into the reasonable cause testing program. *See* Ex. 3 (Oct. 4, 2016 hearing transcript) at 173-174.[5] The July 15, 2014 discipline letter Johnson received from the NFL confirmed Lombardo's placement, stating Johnson would "remain on reasonable cause testing…" Doc. No. 39 at 1738, ¶ 43.

On July 12, 2016, after more than two calendar years in the reasonable cause testing program, Johnson submitted to a Policy urine test at Lombardo's direction. *See* Doc. No. 39 at 1738-1739, ¶ 47. Johnson's test was allegedly positive, and, on September 6, 2016, based on this result, the NFL notified Johnson he was subject to a 10-game suspension. Doc. No. 39 at 1739-1740, ¶¶ 48, 56. Finkle did not certify Johnson's 2016 test as positive. Doc. No. 39 at 1746, ¶ 99. On September 8, 2016, Johnson appealed the pending 10-game suspension and "the manner in which the NFL has applied the Policy." Doc. No. 39 at 1740, ¶ 57.[6]

STANDARD OF REVIEW

Federal courts have authority to vacate an arbitration award in situations that "seriously undermine the integrity of the arbitral process. . . ." *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1353 (6th Cir. 1989) (*citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976)). A court can vacate an arbitration award under the FAA in four situations:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators…;
> (3) where the arbitrators were guilty of misconduct…in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

[5] Lombardo testified, "I place [Johnson] on reasonable cause testing when I review the final documents, because if the B sample doesn't confirm or if the expert scientist does not agree with the -- with the lab reports, then the test goes away. So there's no administrative action. So I don't put him on [reasonable] cause until that -- until that is back and it's sent in for administrative action." Ex. 3 at 173-174. The "expert scientist" Lombardo references is Finkle who emailed Lombardo his confirmation of the lab results on June 23, 2014. Lombardo then sent the case to the NFL for administrative action or discipline on July 1, 2014.

[6] Johnson incorporates the factual averments in his First Amended Complaint. Doc. No. 39 at 1733-1760. Key facts regarding Defendants' and Carter's misconduct supporting vacatur are included in the Law and Argument section.

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Samaan v. Gen. Dynamics Land Sys., 835 F.3d 593, 600 (6th Cir. 2016); 9 U.S.C. § 10(a)(1)-(4).

LAW AND ARGUMENT

I. THIS COURT SHOULD VACATE THE AWARD UNDER FAA § 10(a)(1)

Federal courts may vacate an arbitration award "procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). For vacatur under § 10(a)(1), the movant must demonstrate (1) clear and convincing evidence of corruption, fraud, or undue means, (2) materially related to an issue involved in the arbitration, and (3) that due diligence would not have prompted its discovery during or prior to the arbitration. *Molten Metal Equip. Innovations, Inc. v. Pyrotek, Inc.*, No. 1:10cv388, 2010 U.S. Dist. LEXIS 64238, *5 (N.D. Ohio June 29, 2010) (*citing Int'l Bhd. of Teamstr's, Local 519 v. UPS*, 335 F.3d 497, 503 (6th Cir. 2003)).[7] "Undue means" requires some type of bad faith by the prevailing party. *Barcume v. City of Flint*, 132 F. Supp. 2d 549, 556 (E.D. Mich. 2001) (*citing Pontiac Trail Med. Clinic, P.C. v. PaineWebber, Inc.*, No. 92-1972, 1993 U.S. App. LEXIS 20280, *4 (6th Cir. July 29, 1993)). Here, the NFL, the NFLPA, and Carter denied Johnson his Policy rights of "transparency" and a "fair adjudication."

A. Defendants Disregarded the Policy's Express Arbitrator Selection and Scheduling Provisions

When Johnson appealed his discipline, only two arbitrators existed, not the three to five the Policy required. Doc. No. 39 at 1754, ¶ 146. Additionally, the NFL and the NFLPA appointed the Notice Arbitrator, despite the Policy's requirement that the arbitrators themselves select the Notice Arbitrator. *See* Ex. 4 (March 19, 2015 appointment letter).[8] The Policy also

[7] Unreported decisions cited herein are attached in alphabetical order as Exhibit 16.
[8] The NFL refused to produce this document to Johnson. Johnson received it after his appeal concluded, as part of this proceeding.

mandates that the Notice Arbitrator set the arbitrator schedule and assign arbitrators to hear appeals. Doc. No. 39 at 1753, ¶ 145. In violation of these provisions, Defendants set the schedule and assigned the arbitrators. Ex. 5 (Sept. 22, 2016 hearing transcript) at 21:2-14.

By selecting Carter as a Policy arbitrator (regardless of any conflict he had), Defendants also violated the Policy's requirement that arbitrators be "unaffiliated with the NFL, NFLPA or [NFL] Clubs." Doc. No. 39 at 1757, ¶ 174.[9] Unbeknownst to Johnson, Carter was affiliated with Defendants, as he also served as an arbitrator under the related but separate NFL Policy and Program on Substances of Abuse ("SOA Policy").[10] *See* Ex. 6 (Carter appointment letter).[11]

Johnson sought discovery on these Policy violations, including the identity of the arbitrators and Notice Arbitrator and the assignment schedule. Ex. 7 (Johnson's discovery requests) at Nos. 45-47. In an effort to conceal its violations, the NFL falsely claimed there was an agreement allowing only two arbitrators (Ex. 5 at 18:19-21:16), but the NFL refused to produce this agreement, which likely does not exist, or any documents addressing the identity of the arbitrators or the Notice Arbitrator. Ex. 8 (NFL's discovery responses).[12] Carter authorized the NFL to withhold this relevant information. Ex. 9 (Carter's discovery ruling) at No. 8.

In *Tamarkin Co. v. Chauffeurs*, this Court vacated a labor arbitrator's award, finding that the arbitrator's selection was improper because he "was not selected pursuant to the procedures listed in [the CBA]," the language of which was "clear and unambiguous" as to the composition of the panel from which an arbitrator must be chosen. No. 4:09-CV-2927, 2010 U.S. Dist.

[9] As discussed in more detail below, Carter's law firm also regularly performs services for the NFL and NFL Clubs.
[10] The SOA Policy includes the same "affiliated" preclusion as the Policy. Ex. 15 (SOA Policy) at 23. By their terms, the Policy and SOA Policy are separate policies. *See* Doc. No. 39-1 at 1784 (Policy defined to include only the "Policy on Performance-Enhancing Substances"); Ex. 15 at 1 (SOA Policy defined to include only the "policy regarding substance abuse"). At a minimum, the SOA Policy also required three arbitrators separate and apart from the Policy's three arbitrators. Ex. 15 at 23.
[11] The NFL refused to produce this document to Johnson. Johnson received it after his appeal concluded when the NFL filed it as part of the *Michael Pennel Jr. v. NFLPA, et al.*, No. 5:16-cv-02889-JRA (N.D. Ohio) proceeding.
[12] The NFLPA, likewise, never produced any amendment to the Policy permitting only two arbitrators.

LEXIS 34725, *26 (N.D. Ohio Apr. 8, 2010) (Lioi, J.). In *Allen v. Allied Plan Maint. Co.*, 881 F.2d 291 (6th Cir. 1989), the Sixth Circuit examined an action to vacate an arbitration award in the context of an employee's claim that his union's breach of its duty of fair representation as to arbitrator selection contributed to the erroneous award. The Court explained that, "where, as here, the proof showed that [the employer] and [the union] acted jointly to procure an arbitrator who they thought would be biased against [the employee], it is simple fairness to set aside the arbitration decision even in the absence of finding of bias of the arbitrator." *Id*. at 298.

By appointing the Notice Arbitrator, only selecting two arbitrators, and selecting Carter to hear Johnson's appeal, Defendants demolished the Policy's system for the neutral and random assignment of arbitrators, and, in effect, improperly "cherry picked" the arbitrator to hear Johnson's appeal. For these reasons alone, the Court should vacate the Award.

B. The NFL, NFLPA, and Carter Denied Johnson Relevant Information and Documents Vital to His Appeal

The NFL's initial burden required it to prove Johnson's test was (1) positive (which required that the CFT certified the results), (2) authorized under the Policy (i.e., a proper reasonable cause test), and (3) conducted in accordance with the Policy and laboratory protocols and procedures. Johnson sought and was denied discovery on these very topics. Doc. No. 39-1 at ¶ 58; Ex. 7 at Nos. 1-7, 17-20, 23-24, 30-31, 41-43, 45-47. The NFL refused to provide virtually all of the information Johnson requested (*see* Ex. 8) and went to great lengths, including violating the Policy and lying to Carter, to keep this information from Johnson.

1. The NFL Denied Johnson Discovery Regarding the CFT

The Policy designates Finkle as the CFT, but Finkle did not certify Johnson's 2016 test results. Doc. No. 39 at 1746, ¶ 99. The NFL refused Johnson's requests for documents regarding the CFT as, "vague, ambiguous, irrelevant, overbroad, unduly burdensome, beyond the

scope of discovery…" *See* Ex. 8 at 2. The NFL claimed to Johnson and Carter that it and the NFLPA amended the Policy to delegate CFT duties to others, but completely refused to produce the alleged amendment. *See* Ex. 8 at 2. The NFLPA also failed to provide Johnson this alleged agreement. Doc. No. 39 at 1770 at ¶ 282. Additionally, the NFL never provided actual evidence of any modification to this requirement during the arbitration. Doc. No. 39-1 at 1746, ¶ 98.

2. The NFL Denied Johnson His Testing History and Records

Johnson asked Lombardo to provide him: all his communications with Lombardo; Lombardo's records concerning him; and his testing history documents. Doc. No. 39 at 1744, ¶ 85. Lombardo, at the NFL's direction, rejected Johnson's request, because Johnson filed an appeal. Doc. No. 39 at 1744, ¶ 86.[13] The Policy does not include such a limitation. Doc. No. 39 at ¶ 87. Johnson also sought this information from the NFL, which also refused to provide the information deeming Johnson's requests "overbroad, irrelevant, unduly burdensome, and beyond the scope of discovery contemplated by the Policy." Ex. 10 (Sept.16, 2016 NFL email).[14]

Johnson then included specific discovery requests seeking his testing history, medical records, and documents Lombardo maintained regarding him. Ex. 6 at Requests No. 17-20. The NFL again denied Johnson's requests as "vague, ambiguous, irrelevant, overbroad, unduly burdensome, beyond the scope of discovery…" Ex. 8 at 2. Over objection, Carter permitted the NFL to withhold this vital information. Ex. 9 at No. 5. The NFLPA also refused to provide this information to Johnson. Doc. No. 39 at 1771, ¶ 287(b)

[13] Despite Lombardo's obligation to correspond promptly and contemporaneously to the NFLPA and NFL and seek guidance from both, he did not copy the NFLPA on his email response to Johnson. Doc. No. 39 at 1744, ¶¶ 83-87. The NFL prohibited Lombardo from reporting to the NFLPA. Doc. No. 39 at 1745, ¶ 91. Johnson sought discovery on Lombardo's communications with the NFL regarding him (Ex. 7 at No. 31), but the NFL refused to provide the communications and even claimed they were protected by the attorney-client privilege. Doc. No. 39 at 1745, ¶ 92. Again, Carter denied Johnson this relevant information. Ex. 9 at No. 5.

[14] Johnson immediately notified the NFLPA of Lombardo's and the NFL's refusal to provide Johnson with his personal records and testing history, and reminded the NFLPA of Lombardo's "neutral" and equal obligation to the NFL and the NFLPA. Ex. 11 (Sept. 16, 2016 email to NFLPA). The NFLPA never responded to this email or took action to uphold the terms of the Policy. Doc. No. 39-1 at 1771, ¶ 286.

3. The NFL Denied Johnson Protocols and Procedures

To demonstrate that the NFL could not meet its initial burden that the laboratory followed the Policy's protocols, Johnson requested a copy of the protocols. Ex. 7 at Nos. 1-4. The NFL refused to provide the protocols, which refusal Carter initially condoned. Ex. 9 at Nos. 1-2. On September 30, 2016, however, Carter issued an email "clarification and modification" to his discovery order, which ordered the NFL to produce:

> … any other testing laboratory 'protocols' referenced in the Policy or used by the UCLA lab that were applicable to the testing of samples such as the testing that was done of the sample provided by Mr. Johnson in July 2016, besides the documents contained in the Hearing Binder, the NFL is directed to produce them promptly to Mr. Johnson's counsel and the NFLPA.

Doc. No. 39 at 1755, ¶ 162. In response, the NFL lied to the arbitrator and claimed it already produced these documents. *See* Ex. 12 (Sept. 30, 2016 email); Doc. No. 39 at 1756, ¶ 163.[15] Without the protocols, Johnson could not challenge whether the Collection Vendor, laboratory, and NFL followed the protocols -- something the Policy gives him the right to do.[16]

The NFL, with the NFLPA's effective consent, denied Johnson access to his personal medical records and testing history trampling the alleged "neutrality" of the Policy's Independent Administrator. Doc. No. 39 at 1745, ¶ 94. The NFL committed a fraud on the tribunal when it lied to Carter that it had produced the protocols. Doc. No. 39 at 1756, ¶ 163; Ex. 12.[17]

Tamarkin and *Allen* demonstrate that an arbitrator's award should be vacated where the parties procured it by disregarding the strictures of the collective bargaining agreement or where

[15] The NFL lied to Carter claiming it did not produce World Anti-Doping Agency ("WADA") policies, because they were inapplicable to the Policy and not used by the laboratory. Doc. No. 39 at ¶ 110; Ex. 12. Demonstrating the falsity of this statement, Appendix J of the Policy is a WADA Technical Document. Doc. No. 39-1 at 1824-1834.

[16] As permitted by the Policy (Doc. No. 39-1 at 1791), Johnson hired a toxicologist to observe his "B" sample test to ensure the laboratory followed the protocols. Doc. No. 39 at 1727, ¶ 7. However, both Lombardo and the laboratory refused to provide Johnson's toxicologist with the protocols, preventing him from effectively evaluating the laboratory's testing of Johnson's "B" sample. Doc. No. 39 at 1739, ¶¶ 49-54.

[17] Johnson had reason to believe the same laboratory technician handled both his "A" and "B" samples and that the laboratory improperly destroyed his specimens, both of which violated the Policy. Doc. No. 39 at 1734 (¶ 33), 1737 (¶ 41). However, absent the actual protocols and policies, Johnson was precluded from making such an argument.

an employer and union actively collude to deprive a grievant of a fundamentally fair hearing. Together, through numerous and repeated acts of corruption, fraud, and undue means, the NFL and NFLPA guided the sham arbitration process to produce their desired result.[18] Defendants met Johnson's attempts to expose their corruption with more corruption. This Court should vacate the Award on grounds that the NFL, with assistance from the NFLPA, procured the Award through corruption, fraud, and undue means.

II. THIS COURT SHOULD VACATE THE AWARD UNDER FAA § 10(a)(2)

FAA Section 10(a)(2) empowers a federal court to vacate an arbitration award "where there was evident partiality or corruption" of the arbitrator. 9 U.S.C. § 10(a)(2). The Sixth Circuit's standard for determining arbitrator "evident partiality" arises from the Supreme Court's *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968) decision, as applied by the Second Circuit in *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2nd Cir. 1984). *See Apperson*, 879 F.2d at 1358-1361.

In *Commonwealth*, the Supreme Court vacated an award under the FAA because the arbitrator did not disclose "close financial relations" that existed between him and one party "for a period of years." *Id*. at 147. The majority opinion stated:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by ***the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias***.

Id. at 149 (emphasis added). The Supreme Court then quoted the "highly significant" AAA Rules Section 18, "[a]t the time of receiving his notice of appointment, the prospective Arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator." *Id.*

[18] The numerous deviations from the Policy's explicit terms, which the NFLPA failed to have approved by its members, as required by its Constitution, are set forth at Doc. No. 39 at 1748-1749, ¶¶ 111-122.

The *Commonwealth* majority relied on the concurring opinion, which explained:

> …that ***where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.*** If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.

Id. at 151-152 (emphasis added). In *Morelite*, the Second Circuit relied on *Commonwealth* to hold that "'evident partiality' within the meaning of [FAA] Section 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." 748 F.2d at 84; *see also Appl'd Indust'l Materials Corp v. Ovalar Makline Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2nd Cir. 2007) ("arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists").

In *Apperson*, the Sixth Circuit adopted *Morelite's* evident partiality standard to identify "demonstrated bias." *Apperson*, 879 F.2d at 1358; *see also Nationwide Mutual Ins. Co. v. Home Ins.*, 429 F3d 640, 645 (6th Cir. 2005) (applying *Apperson's* "case-by-case objective inquiry into evident partiality"); *Grego v. Nexagen USA LLC*, No. 5:10cv2691, 2011 U.S. Dist. LEXIS 76966, at *14 (N.D. Ohio Jul. 15, 2011) (Lioi, J.) (alleged partiality "must be direct, definite, and capable of demonstration"). Carter's actions, when combined with Defendants' deceptions, leads to only one conclusion -- Carter demonstrated evident partiality.

"[T]he party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306-307 (6th Cir. 2008) (internal citations omitted). The standard requires more than an appearance of bias, but less than actual bias. *Hardy Indus. Techs., LLC v. BJB LLC*, No. 1:12 CV 3097, 2016 U.S. Dist. LEXIS 174219, *8-9 (N.D. Ohio Dec. 16, 2016) (*citing The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998)). "The alleged partiality must be direct,

definite, and capable of demonstration and 'the party asserting [it] ... must establish specific facts that indicate improper motives on the part of the arbitrator." *Id.*

A. Carter Demonstrated Partiality by Not Making a Conflict Disclosure

The Supreme Court recognized the "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth*, 393 U.S. at 149. The AAA arbitrator rules establish the ongoing duty to disclose potential conflicts. *Commonwealth*, 393 U.S. at 149. Carter himself included these established duties of arbitrator conduct in his book -- "International Commercial Arbitration in New York," ed. James H. Carter & John Fellas, Oxford University Press, 2013. In Section G of Chapter 5, titled "Conflicts Checks and Arbitrator Disclosures," which Carter wrote, he instructs:

> The AAA/ABA Code of Ethics and all international arbitration rules ***require*** arbitrators to disclose any interest or relationship likely to affect their impartiality.

Ex. 13 (excerpts from Carter's book, arrows added) at 131-132 (emphasis added). Carter continues that an arbitrator who is a member of a firm "must conduct a conflict check" and:

> The Second Circuit has interpreted the ***Federal Arbitration Act to impose an affirmative obligation on prospective arbitrators to search their records for and disclose all "nontrivial" conflicts if the arbitrator has reason to believe that such a conflict of interest might exist***. The court nevertheless cautioned:
>
> > We emphasize that we are *not* creating a free-standing duty to investigate. The mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. ***But, when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality***.

Ex. 13 at 132 (*citing Applied Indust.*, 492 F.3d at 138 (emphasis added and in original)).

Carter, ignoring Supreme Court precedent and his own book, ***failed to make any disclosure to Johnson***, including any disclosure of his pecuniary interests. This is more striking given that Carter recognized the need to make some disclosure of potential conflicts as part of

Michael Pennel Jr.'s appeal of NFL issued discipline in December 2016, just two months after Johnson's October 2016 arbitration hearing. *See* Ex. 14 (Dec. 2, 2016 email from Carter).

Only after Pennel raised Carter's failure to disclose, did Carter disclose to him that Carter's firm WilmerHale represented clients engaged in "transactions…with the NFL, the NFL Players Association, NFL teams or owners or NFL players or other personnel." Ex. 14. Carter stated that such representations by his firm would be ongoing, but did not disclose his pecuniary interests in them. Ex. 14. Carter's partial disclosure also included references to his firm's representation of an NFL club in an "ownership matter…of which he was aware," but provided no facts or investigation into that or other potential sources of conflicts. Ex. 14.

Carter's grudging disclosures in December 2016 identified the longstanding and significant relationship between Carter's firm and the NFL, NFL Clubs, and the NFLPA. Carter's failure to disclose these ongoing potential conflicts to Johnson in October 2016 when he deemed them necessary in December 2016 is alone evidence of partiality.

Furthermore, the Policy required the Defendants to appoint "third-party arbitrators not affiliated with the NFL, NFLPA or [NFL] Clubs." Doc. No. 39-1 at 1796. As detailed above, only after his appeal did Johnson learn Carter was affiliated with Defendants as an arbitrator under the SOA Policy. *See* Ex. 6. His joint service under both policies violates the Policy.

Carter's failure to disclose to Johnson his joint service under both the Policy and the SOA Policy evidences his potential bias, as such a disclosure could have cut off Carter's stream of revenue under the Policy, the SOA Policy, or both. Carter also may have allowed the NFL to withhold documents regarding his improper appointment for his own pecuniary reasons, as the fewer Policy arbitrators available (even if only having two arbitrators violates the Policy) means more arbitrations and fees for him. As a "neutral arbitrator" the Policy prohibited Carter from

any "affiliation" with the NFL, NFLPA, or NFL Clubs, and Carter had an unquestionable duty to disclose to Johnson all facts and relationships raising reasonable doubts about his impartiality. Carter disclosed nothing to Johnson. Doc. No. 39 at 1764-1765, ¶¶ 235-238.[19]

B. Carter Demonstrated Bias Throughout the Proceedings

A party may establish an arbitrator's evident partiality based upon past and/or ongoing professional and/or pecuniary interests with a party or by an arbitrator's demonstrated bias during the arbitration process. *Apperson*, 879 F.2d at 1358; *Thomas Kinkade Company v. White*, 711 F.3d 719, 724 (6th Cir. 2013) (court vacates award in reliance on "multiple concrete actions" of the arbitrator demonstrating evident partiality). Indeed, the *Apperson* evident partiality standard does not require proof of a conflict of interest. Instead, it relies on a "case-by-case objective analysis" to determine if "a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration." *Apperson*, 879 F.2d at 1358. Carter's actions, in this appeal, lead to this very conclusion.

1. Carter Refused to Require the NFL to Produce Relevant Documents

Johnson requested documents relevant to his rights under the Policy. Ex. 7. The NFL refused to provide virtually all of the documents Johnson requested, claiming they were irrelevant or, falsely, that the Policy denied Johnson access to them. Ex. 8.

On September 22, 2016, Carter held a discovery hearing. Doc. No. 39 at 1755, ¶ 160; Ex. 5. During that hearing, Johnson reiterated his requests for information regarding: arbitrator selection and scheduling; any alleged amendments to the Policy; Policy and laboratory protocols applicable to Johnson's tests; and Johnson's testing documents and medical records related to the Policy. Ex. 5 at 5:23-6:25. However, Carter's Ruling on Discovery Requests and Objections

[19] Carter attempted to conceal his improper appointment by stating, in the Award, he was properly designated and selected in accordance with the Policy (Doc. No. 39 at 1754, ¶ 153), which he knew to be false.

violated the Policy by impermissibly placing limitations on discovery not included in the Policy. Ex. 9; Doc. No. 39 at 1765, ¶ 239.[20]

Carter's ruling denied Johnson access to virtually all of the relevant information he sought, including information vital to establishing his defenses. Ex. 9. Carter denied Johnson information concerning arbitrator selection and assignment, thus precluding Johnson from stating a basis for appeal on that issue in arbitration. Doc. No. 39 at 1768, ¶ 238. During the second day of hearing on October 4, 2016, Carter again denied Johnson's request to see the alleged amendment to the Policy eliminating the player protections provided by the "neutral" CFT. Ex. 3 at 380-389. In the end, based only on the representation of the NFL's counsel and without actually setting eyes on the alleged written agreement or its terms, Carter concluded that the Policy was amended and ruled against Johnson. Ex. 3 at 389.

2. Carter's Failure to Apply the Policy's Burden-Shifting Paradigm

In its case in chief, the NFL presented no evidence to meet its initial burden that Johnson's test was "authorized under the Policy" or that it was "conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory." Doc. No. 39-1 at 1799. Johnson, specifically, asked Carter to enforce the Policy's burden-shifting paradigm and vacate his discipline because the NFL failed to meet the initial evidentiary burden as explicitly set forth under the Policy. Ex. 3 at 163:4-24, 263:21-264:4. However, Carter voided the Policy's express terms and refused to enforce its burden-shifting paradigm to Johnson's detriment by impermissibly relieving the NFL of its evidentiary burden. Ex. 1; Ex. 3 at 163:25-164:3.

[20] The only discovery precluded by the Policy is to information concerning the application of the Policy to other players and the Policy's bargaining history. Doc. No. 39 at 1737, ¶ 40(j).

3. Carter Relied on Information the NFL Refused to Provide to Johnson

As detailed above, the NFL prohibited Lombardo from providing Johnson his testing history. The NFL also refused to provide Johnson his testing history, calling it "irrelevant." Carter upheld the NFL's refusal. Ex. 9. However, during the October 4, 2016 hearing, the NFL presented a summary of Johnson's alleged reasonable cause testing history – "Exhibit I" -- that Lombardo prepared from the very records Lombardo and the NFL refused to produce to Johnson. Ex. 3 at 226:1-2. Carter condoned the withholding of that information. Ex. 9 at No. 5. Johnson objected to the submission of Exhibit I. Ex. 3 at 49-18-50:8.[21] Despite Johnson's objection, Carter then relied upon Exhibit I to deny Johnson's appeal. Doc. No. 39 at 1768, ¶ 261 (Carter relied on Exhibit I to determine the critical issue as to the date Lombardo placed Johnson in the reasonable cause testing program).[22]

4. Carter Refused to Take an Adverse Inference against the NFL

As detailed above, it became abundantly clear during the October 4, 2016 hearing the NFL failed to provide the protocols applicable to Johnson's tests, in direct conflict with Carter's September 30 "clarification and modification" of his discovery order. Ex. 3 at 238:13-18. Johnson objected to the NFL's refusal to comply with Carter's September 30 order and asked Carter to take a negative inference against the NFL. Specifically, Johnson asked Carter to find that the NFL's refusal to produce the protocols meant the protocols were not followed, thus preventing the NFL from meeting its initial burden. Ex. 3 at 428-429, 627-631. Carter validated the NFL's fraud by refusing to take an adverse inference. Instead, he allowed the NFL to flout his order, and concluded the NFL met its burden to show the protocols were followed. Ex. 1.

[21] Johnson testified Exhibit I was inaccurate and did not include his complete testing history. Ex. 3 at 180:20-181:8.
[22] When Johnson questioned Lombardo, who places players into the reasonable cause testing program, when he placed Johnson in the program, Carter inconceivably shielded Lombardo from answering. Ex. 3 at 223-224.

In *Kinkade*, the Sixth Circuit upheld the district court's vacatur of an arbitrator's award for evident partiality. *Kinkade*, 711 F.3d 719. Years into an arbitration, a party (White) retained the neutral arbitrator's law firm for lucrative engagements.[23] *Id.* at 722. The arbitrator promptly notified the other party (Kinkade) of the retention. *Id*. at 724. Kinkade unsuccessfully sought to disqualify the arbitrator. *Id*. at 722. Subsequently, the arbitrator allowed White to rely on documents White previously refused to produce in response to Kinkade's requests. *Id*. at 722-23. The arbitrator also refused to apply express contract terms or respond to Kinkade's objections. *Id*. at 724. The Court held "Kinkade established a convergence of undisputed facts that, considered together, show a motive for [the arbitrator] to favor the Whites and multiple, concrete actions in which he appeared actually to favor them." *Id*.

Carter's multiple, concrete actions displayed his bias through imposition of discovery restrictions not set forth in the Policy, refusal to require the NFL to produce relevant documents, rejection of the Policy's express burden-shifting paradigm, and his stunning refusal to require the NFL to produce alleged written amendments to the Policy directly related to Johnson's appeal or the protocols he previously ordered the NFL to produce. This Court should vacate the Award on grounds that Carter was evidently partial to the NFL and biased against Johnson.

III. THIS COURT SHOULD VACATE THE AWARD UNDER FAA § 10(a)(3)

A federal court may vacate an arbitration award "where the arbitrators were guilty of…refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). While arbitrators "are not bound by formal rules of procedure and evidence," vacatur lies if "a party to arbitration has been denied a fundamentally fair hearing." *Hardy*, 2016 U.S. Dist. LEXIS

[23] The neutral arbitrator was one member of a three-arbitrator panel. Each party selected one of the other two arbitrators and those arbitrators selected the neutral arbitrator. *Id*. at 720.

174219 at *17-18 (*citing Nat'l Post Office Mailhandlers v. U.S.P.S.*, 751 F.2d 834, 841 (6th Cir. 1985)). "Fundamental fairness" requires an opportunity to present relevant and material evidence and arguments to the arbitrator, and an impartial arbitrator. *Id.* at *18 (*citing Louisiana D. Brown v. Peabody Coal Co.*, No. 99-3322, 2000 U.S. App. LEXIS 1909, *6 (6th Cir. Feb. 8, 2000)).

"The arbitrator is not bound to hear all of the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Hoteles Condado Beach, La Concha & Conv. Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (citing cases from 2nd, 5th, and 6th Circuits). The arbitrator must render a decision "based upon a full and fair consideration of the entire evidence and after he has accorded each witness and each piece of documentary evidence, the weight, if any, to which he honestly believes it to be entitled." *Id.* at 39 (*citing* Elkouri & Elkouri, *How Arbitration Works* 273-74 (3d ed. 1973)).

The Policy specifically provided Johnson the right to "discovery." Doc. No. 39 at 1737, ¶ 40(j). As set forth above, in this case, Carter colluded with the NFL and the NFLPA to deny Johnson access to relevant information. Carter's rulings throughout the appeal process demonstrate his intent to deny Johnson access to information he relied on to formulate the erroneous Award. He allowed the NFL to present information he denied Johnson, allowed the NFL to present a summary of that information without supporting documents, denied Johnson any ability to effectively challenge the information, and then relied on that information to deny Johnson's appeal. Doc. No. 39 at 1766-1767, ¶¶ 245-252. Carter's conduct violated the express terms of the Policy and denied Johnson a full and fair hearing.

The Court should vacate the Award on grounds that Carter refused to allow Johnson access to information pertinent and material to the dispute, refused to hear said evidence, and, to Johnson's peril, selectively and inconsistently determined whether evidence was relevant.

IV. THIS COURT SHOULD VACATE THE AWARD UNDER FAA § 10(a)(4)

A federal court is further authorized to vacate an arbitration award where "the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). "Arbitrators exceed their power when they 'act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.'" *Passa v. City of Columbus*, No. 2:03-CV-81, 2008 U.S. Dist. LEXIS 18604, *11 (S.D. Ohio Mar. 11, 2008). The Supreme Court has articulated a standard for vacatur of awards under 9 U.S.C. § 10(a)(4) that is coterminous with the "essence" test the Court articulated for the vacatur of awards under L.M.R.A § 301 in the *Steelworkers* Trilogy.[24] *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-672 (2010) (vacatur under 10(a)(4) on the ground that the arbitrator "exceeded [his] powers" is appropriate when an arbitrator has strayed from interpretation and application of the agreement and effectively dispensed his own brand of industrial justice); *see also IBEW Local 1985 v. Hoover Co.*, No. 5:05-CV-2780, 2006 U.S. Dist. LEXIS 45310, *13-14 (N.D. Ohio July 5, 2006) (explaining the standard for vacatur under 10(a)(4) by reference to the "essence" test).

Carter exceeded his authority under the Policy by creating new limitations on Johnson's access to discovery, contrary to express Policy terms. The arbitrary nature of Carter's discovery decisions are amplified by his denial of information to Johnson on grounds of "irrelevance" and subsequent decision to accept into the record the same information when offered by the NFL (i.e., Exhibit I). Additionally, nowhere does the Policy grant an arbitrator the authority to accept

[24] The Steelworkers Trilogy refers to: *Unt'd Steelworkers v. American Manuf'g Co*., 363 U.S. 564 (1960); *Unt'd Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *Unt'd Steelworkers v. Warrior & Gulf Nav. Co*., 363 U.S. 574 (1960).

statements of counsel, without verification or support, as fact, but Carter relied on such statements by the NFL on multiple occasions. Doc. No. 39 at 1766, ¶¶ 247-249. Carter also exceeded his authority by annihilating the Policy's burden-shifting paradigm.

Furthermore, Carter knew his selection to hear Johnson's appeal did not comport with the Policy. Doc. No. 39-1 at 1754, ¶ 146. Although Johnson requested information concerning the number, identities, and selection of arbitrators under the Policy, Carter denied Johnson's request. Knowing his authority to hear the dispute was in question, Carter never disclosed any potential conflicts and denied Johnson access to information regarding Carter's improper appointment.

Carter repeatedly exceeded his authority by deviating from substantive Policy provisions. Each instance significantly prejudiced Johnson and denied him a full and fair adjudication. The Court should vacate the Award, because Carter exceeded his authority under the Policy.

CONCLUSION

For the foregoing reasons, Johnson respectfully requests that this Court grant his Motion to Vacate. If the Court feels oral argument is appropriate, Johnson requests such argument.

Respectfully submitted,

ZASHIN & RICH CO., L.P.A.

s/ Stephen S. Zashin

Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff,
David Lane Johnson

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned certifies that this matter has yet to be assigned a track and that this filing adheres to the 20-page limitation set forth in Local Rule 7.1(f) for unassigned cases. This filing also adheres to the page limitations set forth in the Initial Standing Order (Doc. No. 8).

s/ Stephen S. Zashin
Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff,
David Lane Johnson

CERTIFICATE OF SERVICE

The undersigned certifies that on March 17, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

s/ *Stephen S. Zashin*
Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff,
David Lane Johnson